

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

7 IN RE ORMAT TECHNOLOGIES, INC.) 3:10-cv-00177-ECR-RAM
8 DERIVATIVE LITIGATION)
9)
9)
10 This Document Relates To:)
11 ALL ACTIONS)
12)

14 This case arises from a derivative lawsuit filed by Ormat
15 Technology, Inc.'s ("Ormat") shareholders. Now pending is Ormat's
16 Second Motion to Dismiss or Stay Pending First Filed State Court
17 Derivative Action and Related Federal Securities Class Action (#27).

18 || The motion is ripe, and we now rule on it.

I. Background

A. Securities Class Action

22 On March 9, 2010, Wayne Szymborski filed a complaint for
23 violations of federal securities law against Ormat and certain
24 individual defendants in the U.S. District Court of Nevada. Two
25 other related securities class action suits were also brought
26 against Ormat. On June 3, 2010, this Court consolidated the three
27 related securities class action suits. On July 9, 2010, lead
28 plaintiffs Jianxun Dong, George Umino, and A.R.D. Investment Club,

1 L.P. filed a consolidated class action complaint for violations of
 2 federal securities law in the U.S. District Court of Nevada
 3 ("Securities Class Action"). (Sec. Class Action Compl. at 1, 79
 4 (#28-4).)¹

5 Lead plaintiffs sued Yehudit Bronicki and Joseph Tenne and
 6 alleged two causes of action. (Id. at 4, 74, 77.) In the first
 7 cause of action, lead plaintiffs alleged violations of Section 10(b)
 8 of the Exchange Act and Rule 10b-5 because defendants employed
 9 schemes to defraud, made untrue statements of material fact, and
 10 engaged in practices which operated as fraud and deceit upon
 11 purchasers in an effort to maintain artificially high market prices
 12 for Ormat's securities. (Id. at 74.) In the second cause of
 13 action, lead plaintiffs alleged violations of Section 20A of the
 14 Exchange Act. (Id. at 77.) Lead plaintiffs sought the following
 15 relief: (a) class action certification, (b) compensatory damages,
 16 and (c) costs and fees for bringing the action. (Id. at 78.)

17 **B. State Derivative Action**

18 On September 7, 2010, Thomas Hebel and J.L.B. Stolz filed a
 19 consolidated derivative complaint in the Second Judicial District
 20 Court in Washoe County ("State Derivative Action"). (State Compl.
 21 at 2, 73 (#28-12).)² The state plaintiffs sued all of the same
 22 defendants listed in the federal derivative action with the
 23 exception of Joseph Tenne. (See id. at 6-7.) State plaintiffs

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 25 ¹ The page numbers in the Securities Class Action citation refer
 26 to the complaint's original page numbers and not the CM/ECF numbering.

27 ² The original state court complaint was filed on March 16,
 28 2010. (See Second Mot. to Dismiss or Stay (#27) at 7).

1 alleged that defendants had made false and/or misleading statements
2 and had failed to disclose that the company improperly capitalized
3 costs for individual projects it had abandoned instead of expensing
4 the costs. (Id. at 4.) As a result, the company's financial
5 results were overstated, not prepared in accordance with the
6 Generally Accepted Accounting Principles ("GAAP"), and were
7 materially false and misleading. (Id.) State plaintiffs alleged
8 that Ormat misrepresented and failed to disclose material adverse
9 facts regarding severe operational issues plaguing its North
10 Brawley, California, geothermal projects. (Id.)

11 State plaintiffs alleged six causes of action against all
12 defendants. (Id. at 67-69.) In the first cause of action, state
13 plaintiffs alleged a breach of fiduciary duty because defendants
14 improperly misrepresented the business prospects of the company and
15 failed to correct the company's public announcements. (Id. at 67).
16 In the second cause of action, state plaintiffs alleged abuse of
17 control. (Id.) In the third cause of action, state plaintiffs
18 alleged gross mismanagement. (Id. at 68.) In the fourth cause of
19 action, state plaintiffs alleged waste of corporate assets. (Id.)
20 In the fifth cause of action, state plaintiffs alleged unjust
21 enrichment. (Id. at 69.) In the sixth cause of action, state
22 plaintiffs alleged contribution and indemnification. (Id.) State
23 plaintiffs sought the following relief: (a) constructive trust; (b)
24 restitution; and (c) costs and fees for bringing this action. (Id.
25 at 70.)

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1 **C. Federal Derivative Action**

2 On March 29, 2010, Travis Branam, on behalf of Ormat,³ filed a
 3 derivative complaint in this District against certain members of
 4 Ormat's board of directors and executive officers. (Complaint at 1-
 5 2 (#1).) On August 31, 2010, the Court granted an order
 6 consolidating Branam v. Bronicki with Pipefitters Local 537 Annuity
 7 Fund v. Bronicki, et al., no. 3:10-cv-336-LRH-VPC, filed on June 6,
 8 2010. (Order at 6 (#16).) The consolidated case is known as In re
 9 Ormat Technologies, Inc., Derivative Litigation, 3:10-cv-177-ECR-
 10 RAM. (Id. at 7.) The Court granted Plaintiffs leave to file a
 11 consolidated complaint which would be the operative complaint. (Id.
 12 at 10.) On October 28, 2010, Plaintiffs filed a Verified
 13 Consolidated Shareholder Derivative Complaint. (Consolidated Compl.
 14 (#21).) That same day Travis Branam filed a motion to withdraw as
 15 plaintiff and substitute Don B. Dale as plaintiff. (Mot. to
 16 Substitute Pl. at 1 (#20).) Judge McQuaid granted that motion.
 17 (Minute Order (#26).)

18 In the consolidated derivative complaint, Plaintiffs sued
 19 current and/or former members of Ormat's board of directors and
 20 executive officers⁴ for actions taken between March 2008 and the
 21 present. (Consolidated Compl. at 2 (#21).) According to the
 22 complaint, Ormat was engaged in the geothermal and recovered energy

23 ³ Ormat is the nominal defendant in this case.

24 ⁴ Specifically, Plaintiffs sued Yehudit Bronicki (Chief
 25 Executive Officer), Joseph Tenne (Chief Financial Officer), Lucien
 26 Bronicki (Chief Technology Officer), Yoram Bronicki (Chief Operating
 27 Officer), Dan Falk (Director), Jacob Worenklein (Director), Roger Gale
 (Director), and Robert Clarke (Director) (collectively "Defendants").
 (Consolidated Compl. at 6-8 (#21).)

1 power business in the United States and abroad. (Id.) The
2 complaint alleged the following. (Id.) Defendants "engaged in a
3 false and misleading accounting scheme designed to artificially
4 inflate [Ormat's] net income, and in turn, artificially inflate the
5 dividends paid on [Ormat's] stock." (Id.) Instead of using the
6 "successful efforts" method to expense costs, Defendants used the
7 "full cost" method. (Id. at 3.) Defendants "improperly capitalized
8 costs with [Ormat's] abandoned projects, instead of expensing those
9 costs" in violation of GAAP. (Id. at 2-3.) Defendants continued to
10 use this accounting scheme after the Securities and Exchange
11 Commission ("SEC") informed Defendants about serious issues
12 involving their accounting practices. (Id. at 3.) Defendants
13 continued to use this scheme until February 24, 2010, when the SEC
14 forced Defendants to disclose to the public that the company's
15 financial statement for year end December 31, 2008, and the first
16 three quarters of 2009, could not be relied upon and had to be
17 restated. (Id.) During the relevant time period, Defendants issued
18 a series of false or misleading statements and failed to disclose
19 material adverse facts about the company's business, operations, and
20 prospects. (Id. at 4.) Defendants wanted to artificially inflate
21 the company's net income, profits, share price, and dividends.
22 (Id.) Defendants wanted to artificially inflate dividends in order
23 to protect the Bronicki family's ownership interest. (Id. at 5.)
24 The Bronicki family owned 35% of Ormat Industries Ltd., which owned
25 56% of Ormat. (Id.) The Bronicki family used their ownership
26 interest as collateral for a loan they took out in response to a
27 takeover attempt in December 2007. (Id.) A decline in stock price

1 would have caused the Bronicki family to lose half of their
2 ownership interest in Ormat. (Id.) The artificially inflated
3 dividends provided the Bronicki family with income to pay down the
4 loan without selling collateral shares or risk losing their
5 controlling interest in the company. (Id.)

6 The complaint alleged the following causes of action against
7 all Defendants. (Id. at 62.) In the first count, Plaintiffs
8 alleged a breach of fiduciary duty for disseminating false and
9 misleading information. (Id.) In the second count, Plaintiffs
10 alleged a breach of fiduciary duty for failing to maintain internal
11 controls to ensure that Ormat's financial statements were prepared
12 in accordance with GAAP. (Id. at 63.) In the third count,
13 Plaintiffs alleged a breach of the fiduciary duties of loyalty and
14 good faith for failing to properly apply the proper accounting
15 treatment to Ormat's abandoned geothermal projects. (Id.) In the
16 fourth count, Plaintiffs alleged unjust enrichment at the expense
17 and detriment of Ormat. (Id. at 64.) In the fifth count,
18 Plaintiffs alleged abuse of control by allowing Ormat to
19 misrepresent material facts regarding its financial position and
20 business prospects. (Id. at 64-65.) In the sixth count, Plaintiffs
21 alleged gross mismanagement. (Id. at 65.) In the seventh count,
22 Plaintiffs alleged a waste of corporate assets for causing Ormat to
23 incur significant legal liability and/or legal costs to defend
24 itself as a result of Defendants' unlawful actions. (Id. at 66.)
25 Plaintiffs sought: (a) the amount of damages sustained by the
26 company as a result of the fiduciary breaches; (b) to compel the
27 company to take all necessary actions to reform and improve its

1 corporate governance and internal procedures; (c) restitution and
2 disgorgement of profits; and (d) costs and fees for bringing this
3 suit. (Id. at 66-67.)

4 On March 7, 2011, the case was reassigned to this Court from
5 Judge Robert C. Jones because of the pending securities class
6 action.

7 Now pending before this Court is Ormat's Second Motion to
8 Dismiss or Stay Pending First Filed State Court Derivative Action
9 and Related Federal Securities Class Action Litigation ("the
10 Motion") (#27). Ormat filed the Motion (#27) on December 13, 2010.
11 On January 12, 2011, Plaintiffs opposed (#29). On February 2, 2011,
12 Defendant replied (#31) in support of the Motion (#27).

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14 **II. Discussion**

15 Ormat requests a stay of this derivative shareholder action
16 pending the outcome of the Securities Class Action, and/or the State
17 Derivative Action. We will consider Ormat's arguments for a stay
18 pending the outcome of each action separately.

19 **A. Securities Class Action**

20 "[T]he power to stay proceedings is incidental to the power
21 inherent in every court to control the disposition of the causes on
22 its docket with economy of time and effort for itself, for counsel,
23 and for litigants." Landis v. North America Co., 299 U.S. 248, 254
24 (1936). The court has discretion to grant a stay when the stay
25 serves the interests of judicial economy and efficiency. Rivers v.
26 Walt Disney Co., 980 F. Supp. 1358, 1360 (C.D. Cal. 1997). The
27 court should consider "the possible damage which may result from the

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1 granting of a stay, the hardship or inequity which a party may
2 suffer in being required to go forward, and the orderly course of
3 justice measured in terms of the simplifying or complicating of
4 issues, proof, and questions of law which could be expected to
5 result from a stay." Filtrol Corp. v. Kelleher, 467 F.2d 242, 244
6 (9th Cir. 1972).

7 Ormat argues that this case should be stayed pending the
8 outcome of the Securities Class Action to prevent harm to itself and
9 to promote judicial efficiency. (Second Mot. to Dismiss or Stay at
10 9-10 (#27).) It argues that, if Plaintiffs proceed with this case,
11 they would aid the class action plaintiffs in obtaining damages
12 against Ormat. (Id. at 10.) Additionally, it argues that the
13 Securities Class Action raised similar issues based on the same
14 allegedly false public statements. (Id. at 12.) It argues that the
15 same issues must be resolved in both cases and it would constitute a
16 waste of scarce judicial resources to litigate the issues twice.
17 (Id. at 12-13.) It also asserts that this action is premature
18 because the relief sought in this case depends on the outcome of the
19 Securities Class Action. (Id. at 13.)

20 In response, Plaintiffs argue that the action should not be
21 stayed pending a decision in the Securities Class Action because the
22 two cases are substantially different because one is a derivative
23 suit and the other is a lawsuit against the company. (Opp. to
24 Second Mot. to Dismiss or Stay at 13 (#29).) They assert that their
25 claims are legally cognizable and are not dependent on the outcome
26 of the Securities Class Action. (Id. at 17.)

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1 A shareholder derivative suit "allows shareholders to bring
 2 claims for the enforcement of a company's rights against the company
 3 directors if the company has not enforced those rights itself."
 4 Breault v. Folino, No. SACV10826GLTANX, 2002 WL 31974381 at *1 (C.D.
 5 Cal. 2002) (citing FED. R. Civ. P. 23.1). A balance must be struck
 6 between legitimate corporate claims in a derivative shareholder suit
 7 and a corporation's best interests. Zapata Corp. v. Maldonado, 430
 8 A.2d 779, 789 (Del. 1981). The concerns of hardship and equity to
 9 the moving party are especially relevant in shareholder derivative
 10 cases when a securities class action suit is proceeding on the same
 11 issues. See, e.g., Cucci v. Edwards, No. SACV 07-532 PSG (MLGx),
 12 2007 WL 3396234 at *2 Breault, 2002 WL 31974381 at *2.

13 A stay of this derivative action is warranted because of the
 14 duplicative nature of the two actions, and the potential harm to
 15 Ormat, the party on whose behalf this derivative suit has been
 16 brought. Prosecution of this action will "conflict with [Ormat's]
 17 defense of the pending class action[]." Breault, 2002 WL 31974381
 18 at *2. Defendants are witnesses that Ormat will rely upon in the
 19 Securities Class Action. In order for Plaintiffs to succeed,
 20 Plaintiffs will need to undermine the credibility of Ormat's
 21 witnesses and defense in the Securities Class Action. See id.; cf.
 22 In re E.F. Hutton Banking Practices Litig., 634 F. Supp. 265, 270
 23 (S.D.N.Y. 1986) ("the directors whom plaintiffs wish to sue would be
 24 important witnesses for the Corporation in all of this existing and
 25 threatened litigation"). Furthermore, this action will "divert
 26 [Ormat's] financial and management resources from the [Securities
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1 Class Action]." Breault, 2002 WL 31974381 at *2; see also Cucci,
2 2007 WL 3396234 at *2.

3 A stay of this action would also preserve judicial resources
4 because the claims and parties in the two lawsuits substantially
5 overlap. Plaintiffs claim that the issues and parties do not
6 overlap because this action names six individual defendants from
7 Ormat's Board of Directors who are not parties to the Securities
8 Class Action. (Opp. to Second Mot. to Dismiss or Stay at 14
9 (#29).) The fact that Plaintiffs in this case are not lead
10 plaintiffs in the Securities Class Action, and that there are
11 additional defendants in this case, do not require a finding that a
12 stay is not warranted. We do not believe that the two actions must
13 involve exactly the same parties and that Plaintiffs of a
14 shareholder derivative suit must be the lead plaintiffs in the class
15 action suit in order for a stay. Plaintiffs also claim that the
16 issues are different because the Securities Class Action alleges
17 that Ormat and two of its officers defrauded investors by knowingly
18 making false statements about Ormat's accounting methods in
19 violation of federal securities laws, whereas this action alleges
20 breach of fiduciary duty and other state law claims. (Id.)
21 However, both lawsuits are based on Defendants' accounting practices
22 and public financial statements during 2008 and 2009. The
23 difference in claims arises from the nature of each action, that is,
24 the way in which all shareholder derivative actions differ from
25 securities class actions.

26 Nor do we find Plaintiffs' claim that a stay will actually
27 result in more harm to Ormat because "witnesses will scatter,"

1 documents will be lost, and memories will inevitably fade" a
 2 compelling argument. (Opp. to Second Mot. to Dismiss or Stay at 14-
 3 15 (#29).) Plaintiffs may be able to benefit from the proceedings
 4 in the Securities Class Action, and any potential harm from delayed
 5 litigation is more than outweighed by the harm of denying the stay
 6 and forcing Ormat to expend resources on this derivative suit, and
 7 the harm to Ormat of having its witnesses for the Securities Class
 8 Action undermined in this action.

9 Therefore, we find that the harm to Ormat, as well as the
 10 interests of judicial economy, outweigh any suggested prejudice to
 11 Plaintiffs. This action will be stayed pending the outcome of the
 12 Securities Class Action.⁵

13 **B. State Derivative Action**

14 Ormat argues that the case should be dismissed or stayed
 15 pursuant to the doctrine announced in Colorado River Water
 16 Conservation District v. United States, 424 U.S. 800 (1976).
 17 (Second Mot. to Dismiss or Stay at 13 (#27).) Under the Colorado
 18 River doctrine, a court may stay federal proceedings pending the
 19 resolution of a concurrent state court proceeding involving the same
 20 matter based on considerations of "wise judicial administration,
 21 giving regard to conservation of judicial resources and
 22 comprehensive disposition of litigation." Holder v. Holder, 305
 23 F.3d 854, 867 (9th Cir. 2002) (quoting Colorado River, 424 U.S. at

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 25 ⁵ We note that there are defendants in this action that are not
 26 involved in the Securities Class Action. Proceeding with the action
 27 with respect to those defendants, however, and not to other
 defendants, would not be an efficient use of judicial resources, and
 would result in harm to Ormat, and therefore, the entire action shall
 be stayed.

1 817, 96 S.Ct. at 1246); see also Moses H. Cone Mem'l Hosp. v.
 2 Mercury Constr. Corp., 460 U.S. 1, 16 (1983). The Ninth Circuit has
 3 held that "exact parallelism . . . is not required" and that it is
 4 "enough if the two proceedings are 'substantially similar.'" Nakash
 5 v. Marciano, 882 F.2d 1411, 1416 (9th Cir. 1989). "Suits are
 6 parallel if substantially the same parties litigate substantially
 7 the same issues in different forums." Commercial Cas. Ins. v.
 8 Swarts, Manning & Assoc., 616 F.Supp.2d 1027, 1032-33 (D. Nev.
 9 2007). Because "[a]bstention from the exercise of federal
 10 jurisdiction is the exception, not the rule," a district court may
 11 dismiss or stay an action only in "exceptional circumstances."
 12 Colorado River, 424 U.S. at 813.

13 Under the exceptional-circumstances test, a court considers the
 14 following factors: (1) whether either court has assumed jurisdiction
 15 over a *res* or property; (2) the relative convenience of the forums;
 16 (3) the desirability of avoiding piecemeal litigation; (4) the order
 17 in which the forums obtained jurisdiction; (5) whether state or
 18 federal law controls; and (6) whether the state proceeding is
 19 adequate to protect the parties' rights. Nakash, 882 F.2d at 1415.
 20 A court may also consider whether a party is forum shopping in
 21 order to avoid adverse rulings by the state court. Id. at 1417.
 22 These "factors are to be applied in a pragmatic and flexible way, as
 23 part of a balancing process rather than as a 'mechanical
 24 checklist.'" Am. Int'l Underwriters (Phillipines), Inc. v. Cont'l
 25 Ins. Co., 843 F.2d 1253, 1257 (9th Cir. 1988) (quoting Moses H.
 26 Cone, 460 U.S. at 16).

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1 Ormat argues that the State Derivative Action and the current
2 case are nearly identical because they are both derivative suits
3 that allege breach of fiduciary duty, abuse of control, gross
4 mismanagement, waste of corporate assets, and unjust enrichment.
5 (Second Mot. to Dismiss or Stay at 15 (#27).) With respect to the
6 Colorado River factors, it asserts that the first two factors are
7 irrelevant because neither action concerns a property dispute and
8 both courts are located in Nevada. (Id. at 16.) It argues that the
9 piecemeal-litigation factor favors abstention because both cases are
10 predicated on showing the same breach of fiduciary duty and the two
11 courts could reach inconsistent results. (Id.) Under the fourth
12 factor, it asserts that the parties have been more active in the
13 State Derivative Action because it filed a motion to dismiss for
14 failure to plead particularized facts there. (Id. at 18.) It
15 asserts that the fifth and sixth factors favor abstention because
16 the causes of action are based on state law and could be adequately
17 adjudicated in state court. (Id. at 18-19.) It also argues that
18 Plaintiffs engaged in forum shopping because they intentionally
19 chose federal court to avoid consolidation with the State Derivative
20 Action. (Id. at 19.)

21 In response, Plaintiffs contend that this action and the State
22 Derivative Action are not parallel because they involve different
23 parties, different claims, and different time periods. (Opp. to
24 Second Mot. to Dismiss or Stay at 20-21 (#29).) They argue that,
25 even if the cases were parallel, the factors weigh against
26 abstention. (Id. at 21-22.) They argue that the first two factors
27 weigh against abstention because there is no property and the forum

1 is not inconvenient. (Id. at 22.) They argue that the State
2 Derivative Action has not progressed significantly further than this
3 case because it is only at the motion to dismiss stage. (Id. at
4 25.) They assert that, although state law does apply, it does not
5 present rare circumstances in which the federal court should dismiss
6 the suit. (Id. at 26.) They contend that the state court would not
7 adequately protect the parties' rights because the State Derivative
8 Action does not name one of the defendants listed in the current
9 action. (Id. at 27.) They assert that their choice to file in
10 federal court is not paramount to forum shopping because Ormat has
11 not presented any evidence of bad faith. (Id.)

12 Here, the instant case and the State Derivative Action are
13 substantially similar to each other. Both sets of plaintiffs,
14 although different, are suing substantially the same board of
15 directors/officers on behalf of Ormat, for breach of their fiduciary
16 duties related to misleading accounting practices related to the
17 abandoned geothermal projects. Additionally, both sets of
18 plaintiffs are suing for abuse of control, gross mismanagement,
19 waste of corporate assets, and unjust enrichment.

20 Under the exceptional-circumstances test, neither the first nor
21 second factors are relevant to this case. There is no property in
22 dispute that is the sort of tangible physical property referred to
23 in Colorado River. See Am. Int'l Underwriters, 843 F.2d at 1257-58.
24 Additionally, because both forums are located in Reno, Nevada, both
25 are equally convenient. See Nakash, 882 F.2d at 1415 n.6.

26 Under the third factor, piecemeal litigation "occurs when
27 different tribunals consider the same issue, thereby duplicating

1 efforts and possibly reaching different results." Am. Int'l
 2 Underwriters, 843 F.2d at 1258. However, the Ninth Circuit has
 3 stated that "conflicting results, piecemeal litigation, and some
 4 duplication of judicial effort is the unavoidable price of
 5 preserving access to . . . federal relief." Neuchatel Swiss Gen.
 6 Ins. v. Lufthansa Airlines, 925 F.2d 1193, 1195 (9th Cir. 1991)
 7 (quotations omitted). "A correct evaluation of this factor involves
 8 considering whether exceptional circumstances exist which justify
 9 special concern about piecemeal litigation." Travelers Indem. Co.
 10 v. Madonna, 914 F.2d 1364, 1369 (9th Cir. 1990). In Travelers, the
 11 Ninth Circuit found that if the state court had not made any rulings
 12 in regard to the dispute, there was "no certainty that duplicative
 13 effort would result." Id. The Ninth Circuit held that "whichever
 14 court were to first reach a judgment on the merits, that judgment
 15 would most likely have conclusive effect on the other court." Id.

16 Here, the third factor weighs against a stay. It is true that,
 17 if both cases were to proceed, both courts would adjudicate whether
 18 Defendants had breached their fiduciary duties. However, Ormat has
 19 not demonstrated that there is anything exceptional in this case
 20 that would justify special concern about this piecemeal litigation.
 21 The only dispositive motion filed in this case has been an un-ruled
 22 upon motion to dismiss in the state court and, as such, there is no
 23 certainty that a duplicative effort would result in the courts. (See
 24 Second Mot. to Dismiss or Stay at 18 (#27)); Travelers, 914 F.2d at
 25 1369.

26 Under the fourth factor, order in which the forums obtained
 27 jurisdiction, the Court examines "how much progress has been made
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1 in the two actions." Moses H. Cone, 460 U.S. at 21. Here, the
2 State Derivative Action has not progressed much further than this
3 case. The only filing made in state court has been a motion to
4 dismiss, which has yet to be ruled on. Thus, this factor weighs
5 against a stay.

6 Under the fifth factor, the source-of-law factor, "the
7 presence of state-law issues may weigh in favor of a surrender" only
8 "in some rare circumstances." Moses H. Cone, 460 U.S. at 26. Here,
9 the case involves routine issues of state law breach of fiduciary
10 duty, abuse of control, gross mismanagement, waste of corporate
11 assets, and unjust enrichment. This Court is fully capable of
12 deciding these issues and, as such, there are no "rare
13 circumstances." See Travelers, 914 F.2d at 1370 (holding that there
14 were no rare circumstances where a district court was fully capable
15 of deciding a case involving routine issues of state law such as
16 misrepresentation, breach of fiduciary duty, and breach of
17 contract). Therefore, this factor weighs against a stay.

18 Under the sixth factor, whether the state proceeding is
19 adequate to protect the parties' rights, a court must determine
20 "the state court's adequacy to protect federal rights, not the
21 federal court's adequacy to protect state rights." Travelers, 914
22 F.2d at 1370. The Ninth Circuit has "not applied this factor
23 against the exercise of federal jurisdiction, only in favor of it."
24 Id. In this case, this factor is unhelpful because there are no
25 federal causes of action in this case and, thus, this Court has no
26 concern whether the state court may adequately protect federal
27 rights.

1 Under the forum-shopping factor, "forum shopping weighs in
2 favor of a stay when the party opposing the stay seeks to avoid
3 adverse rulings made by the state court or to gain a tactical
4 advantage from the application of federal court rules." Travelers,
5 914 F.2d at 1371. Ormat does not allege that Plaintiffs had either
6 of these purposes in mind when they chose federal court. (See
7 Second Mot. to Dismiss or Stay at 19 (#27) (arguing that Plaintiffs
8 chose federal court to avoid consolidation with the State Derivative
9 Action)). Even if Plaintiffs chose federal court to avoid state
10 court consolidation, it would not be the type of forum shopping that
11 would weigh in favor of a Colorado River stay or dismissal.

12 Accordingly, there are no exceptional circumstances in this
13 case that warrant a Colorado River stay or dismissal. Therefore, we
14 will deny Ormat's motion to dismiss or stay pending the first filed
15 State Derivative Action (#27).

III. Conclusion

18 Ormat requests a stay pending the outcome of the Securities
19 Class Action and/or the State Derivative Action. Because of the
20 similarity of the issues, claims, and parties between the Securities
21 Class Action and this action, as well as the potential for
22 substantial harm to Ormat if this case were to proceed alongside the
23 Securities Class Action, this action will be stayed pending the
24 outcome of the Securities Class Action. However, because Ormat has
25 failed to show exceptional circumstances warranting a stay of this
26 action pending the State Derivative Action, the stay granted extends
27 only to the conclusion of the Securities Class Action.

1 **IT IS, THEREFORE, HEREBY ORDERED** that Ormat's Second Motion to
2 Dismiss or Stay Pending First Filed State Court Derivative Action
3 and Related Federal Securities Class Action Litigation (#27) is
4 **GRANTED IN PART AND DENIED IN PART** on the following basis: this
5 action is stayed pending the outcome of the federal Securities Class
6 Action (3:10-CV-00156-ECR-RAM), but is not stayed with respect to
7 the State Derivative Action.

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10 DATED: August 29, 2011.

11 
12 UNITED STATES DISTRICT JUDGE

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